93-851

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

DARRYL BLACKMON,

Petitioner,

VS.

WAL-MART STORES, INC.,
d/b/a/ SAM'S WHOLESALE CLUB,

Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

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WHETHER THE PROTECTIONS AFFORDED BY THE CIVIL RIGHTS ACT OF 1991 SHOULD BE APPLIED RETROACTIVELY TO CASES PENDING ON THE DATE THIS ACT BECAME LAW OF ITS OCCURRENCE.

PARTIES IN THE COURT BELOW

All parties in this matter are set forth in the caption of this case.

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Civil Rights Act of 1991, Pub.L.No. 102-166, 105 Stat. 1071-1099

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
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The Petitioner, Darryl Blackmon, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on August 27, 1993, affirming a judgment of the United States

District Court for the Southern District of Alabama. The opinion of the Court of Appeals is set out in Appendix A infra.

JURISDICTION

The Judgment of the Court of Appeals reversing the District Court's Judgment was entered on August 27, 1993. APP. A. The jurisdiction of this Court is found in 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

This case involves the Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat 107-1099.

STATEMENT OF THE CASE

Proceedings Below

The petitioner, Darryl Blackmon, filed an EEOC Charge of Discrimination against his employer, the Respondent, Wal-Mart Stores Inc. d/b/a Sam's Wholesale Club, on December 28, 1989.

Petitioner's charge alleged racial discrminiation by the Repondent's failure

to promote him and his subsequent termination on August 26, 1989.

Following receipt of his Notice of Right to Sue, Petitioner filed his lawsuit in the federal district court on February 10, 1992, alleging a violation of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, and 42 U.S.C. Section 1981.

On December 4, 1992, at a pretrial conference, Petitioner conceded, without agreeing, that the trial of this case should proceed without the benefit of the requested jury, in light of the district court's recent rulings in several cases that the Civil Rights Act of 1991 should not, and would not, be given retroactive application.

The case was tried on January 17, 1993, before the district judge sitting without a jury, and concluded on January 19, 1993, with the court taking the matter under submission.

By Order and Judgment dated February 1, 1993, the district court entered judgment in favor of the employer, holding that substantial evidence was not produced from which a factfinder could reasonably conclude that the employer intended to discriminate on the basis on race. This judgment was affirmed by the Eleventh Circuit in an unpublished opinion. App. at 1a.

Statement of Facts

Petitioner, a black male, had been employed by Sam's since April 1987, as a stocker in the grocery section of the warehouse.

Petitioner was terminated by the Respondent on August 26, 1989, and at the time his job title was stocker/forklift driver in the Hardlines department.

During Petitioner's tenure with the Respondent's warehouse, the store was managed Mr. Bert Ritter, and the assistant manager was Stewart Wortham.

The reason given Petitioner for his discharge was reduction of staff, and the exit interview form completed on Petitioner by Mr. Ritter at the time of his discharge, indicated that he was eligible for re-hire.

At the time of Blackmon was fired Charles Whatley, another employee in the hardlines department, was also laid off. Mr. Whatley, who was white, had only been in hardlines for approximately four (4) months, and he served as a stocker. Prior to his transfer to hardlines, Mr. Whatley had been a part time employee on the Respondent's janitorial staff.

Approximately two months prior to his terminnation, Blackmon expressed an interest in a supervisory vacancy in the hardlines department. Sam's had solicited a white employee for the vacancy, but due to her high absentee record, the position was not offered to her.

Mnagement never approached Blackmon

regarding his interest in the position, as was done with a white employee.

After Blackmon expressed concerns that he was not promoted due to his race, the position was "filled" by consolidating the hardlines department with another department, and using the present white supervisor for both departments.

REASON FOR GRANTING THE WRIT

THE MAIN ISSUE IN THIS APPEAL IS WHETHER THE PROTECTIONS AFFORDED BY THE CIVIL RIGHTS ACT OF 1991 SHOULD BE APPLIED RETROACTIVELY TO CASES PENDING ON THE EFFECTIVE DATE OF THE THE 1991 ACT.

Certiorari has granted in two cases involving the issue of the retroactive application of the 1991 Act, Landgraf v. USI Film Products, 968 F.2d 427 (5th Cir.1992), cert. granted in part, 113 S.Ct. 1250 (1993), and Harvis v. Roadway Express Inc., 973 F.2d 490 (6th Cir.1992)

This case is one of many nationwide

that will be directly affected by this Court's ruling on the issue of retroactivity, and the reasons for granting the writ in Landgraf apply equally to this case. Petitioner's jury request and damages would be directly affected by the Supreme Court's ruling on this issue.

CONCLUSION

Considering the foregoing, petitioner respectfully requests that a Writ of Certiorari issue to review the August 27, 1993 judgmnt of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

RONNIE L. WILLIAMS
Attorney for Petitioner
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(205) 432-6985

November 26, 1993

APPENDIX "A"

THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

DARRYL BLACKMON	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 92-0113-BH-C
WAL-MART STORES, INC. d/b/a/ SAMS'S WHOLE-SALE CLUB,	)	
Defendant.	)	

JUDGMENT

Pursuant to the Order entered simultaneously herewith, it is ORDERED, ADJUDGED and DECREED that judgement be entered in favor of Defendant Wal-Mart Stores, Inc., d/b/a Sam's Wholesale Club, and against Plaintiff Darryl Blackmon.

DONE this 1st day of February, 1993.

W. B. Hand
Senior District Judge

IN THE UNTIED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

DARRYL BLACKMON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION
	)	NO. 92-0113-
	)	BH-C
WAL-MART STORES, INC.	)	
d/b/a SAM'S WHOLESALE CLUB,	)	
	)	
Defendant.	)	

ORDER

In accordance with the following Findings of Fact and Conclusions of Law, the Court enters judgment in favor of Wal-Mart Stores, Inc. d/b/a Sam's Wholesale Club.

FINDINGS OF FACT

The Plaintiff, Darryl Blackmon, is a black male and was employed as a stocker in the "hardlines" department of the Sam's Club in Mobile until August 25, 1989. The

manager of the Defendant Club is Mr. Bert Ritter, a white male, who has served as store manager in the Mobile facility since March or April, 1989. On December 12, 1989 Plaintiff filed a Charge of Discrimination against the Defendant with the Birmingham Regional Office of the Equal Employment Opportuntity Commission ("EEOC"). In the Charge of Discrimination, Plaintiff alleged racial discrimination as to his August 25, 1989 termination and racial discrimination relating to his on-the-job treatment by the Defendant. The EEOC did not find reasonable cause to substatiate the allegations of discrimination and issued Plaintiff a Notice of Right to Sue.

The Plaintiff's Complaint by statement of the parties limits his contentions to a claim that he was discharged because of his race in violation of the Title VII of the Civil Rights Act of 1964, as amended. The

triable issues include determinations of whether the Plaintiff was discriminated against based on his race because he requested a promotion and commented on racial overtones and harassment in the workplace. Further, a final issure is whether Plaintiff would have been terminated regardless of any alleged discrimination due to Plaintiff's poor work performance and economic factors allegedly procipating the reduction in force in which the Plaintiff was discharged.

The evidence in this regard shows that he was employed as a stocker, that his department and another department were consolidated, and that each department had a supervisor. When the departments were consolidated, one of the two supervisors became the supervisor for the consolidated department. Plaintiff alleges that he applied for the position which he thought was vacant as a result of Wal-Mart

terminating one of the supervisors. This is the promotion Plaintiff claims he did not get because of his race.

There was a reduction in force and some nine employees were released. Five of the terminated employees were white, three were black, and one was hispanic. Plaintiff alleges the lay-off was not for the purpose of economics but was a subterfuge to get rid of him in retaliation for his complaints.1 Mr. Ritter testified that Charles Long, Director of Operations for the region, stated that Mr. Ritter's payroll was too high and layoffs were necessary. Further, Mr. Ritter explained that he decided which individuals were to be laid off based almost exclusively on their productivity. No business records were shown to substantiate this contention, but likewise no evidence was inroduced by Plaintiff, who had the burden to prove that it was not so. Therefore, the Court

has no option but to conclude that the reasons for the reduction were legitimate.

The real issue is wheter or not rehiring was a product of racial discrimination. The plaintiff argues that they did not call him back and offer him the job when economic conditions improved because they knew he was interested in re-employment. To support this, he testified that, in 1991, several employees were called back and reinstated by management after having been laid off.

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1 The Court finds from the evidence that statistically the overall hiring practice of Wal-Mart at the Mobile store indicates a consciousness by Wal-Mart for a balanced hiring practice. The percentage of blacks employed far exceeds the percentage of blacks in the workforce in this area. Mr. Ritter testified that approximately 56 percent of the Mobile store's workforce is black and approximately 44 percent is white. The evidence also indicates that promotional practices by Wal-Mart in the Mobile store reflect ther is no restriction or discrimination as to blacks. The number of blacks holding managerial positions is proportional to their employment percentages. Therfore, the Court does not see any discrimination in this practice.

This conclusion is supported by the findings of the EEOC.

As to the persons actually recalled after the 1989 layoff, one black was recalled first and there is no evidence whether this person had called or filed an application for rehire. The other person recalled, a white, did fill out a written application. However, Plaintiff contends that the white rehiree filled out the applicaion only after being invited to do so by management. This is a credibility determination because management said the re-emloyed man frequented the store, continued to ask about re-employment and obtained and filled out an application.

The Plaintiff did not deny having knowledge of the requirement for filling out an application for re-employment. He simply relied on an alledged verbal statement indicating he was interested in re-employment. At no time did he file any

written application. Plaintiff argues that Wal-Mart reinstated two employees following a general lay-off of eight employees in December, 1991, without requiring written applications. However, these rehirings occurred two years after the Plaintiff was terminated and involved special circustances. These employees complained to the main offices of Wal-Mart and one of the people facsimiled a letter of complaint to the store's headquarters. As a result of these complaints and unique circumstances, Wal-Mart reinstated two of the employees. This action did not constitute a change in the official policy requiring the submission of written applications as a prerequisite to re-employment.

The Complaint registered by these employees was that they were improperly selected for discharge due to their length of employment. This was, as stated, called to management's attention in

writing. Consequently, management rehired two of the employees. There is no evidence that a similar condition existed in Plaintiff's case, or if it did that the issue was called to management's attention. The evidence showed that Plaintiff was an acceptable employee and was eligible for rehire. Plaintiff did not demonstrate that he would not have been rehired even if he had submitted a written application. In fact, each employee laid off was shown to have his or her faults but not of such a magnitude as to preclude rehire.

CONCLUSIONS OF LAW

1. The basic framework for ananlyzing "disparate treatment" cases such as this one, in which there is no direct evidence of discrimination, was established by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

2. In the context of reduction-in-force cases, the Eleventh Circuit has held that a plaintiff establishes a prima facie case under the McDonnell Douglas-Burdine analysis

> by demonstrating (1) that he was in a protected [class] and was adversely affected by an employment decision; (2) that he was qualified for his current position or to assume another position at the time of discharge or demotion; and (3) evidence by which a fact finder might reasonabley conclude that the employer intended to discriminate on the basis of [an impermissible reason] in reaching the decision at issue.

Earley v. Champion International Corporation, 907 F.2d 1077, 1082 (11th Cir. 1990).

3. The Court has determined, and the Defendant agrees, that the first two elements of the Plaintiff's prima facie case have been met.

4. However, there is no substantial evidence from which a fact finder could "reasonably conclude that the employer intended to discriminate" on the basis of race in regard to Plaintiff's termination.

5. Further, even if the third element had been satisified and Plaintiff had established a prima facie case, the Defendant's justification evidence is sufficient for the court to find in its favor. As explained in Earley v. Champion International Corp., 907 F.2d 1077, 1081 (11th Cir. 1990):

> The inference of intentional discrimination raised by a plaintiff's prima facie case "may be stronger or weaker, depending upon the facts of the particular case." Grigsby, 821 F. 2d at 595. "To a large extent, of course, the strength of weakness of the inference of discrimination created by the employee's prima facie case defines the nature of the employer's rebuttal." See Meiri v. Dacon, 759 F.2d 989, 997 (2d Cir. 1985). In some cases, the defendant's evidence of a legitimate non-discriminatory reason for its actions may be so strong as to rebut completely the inference raised by the plaintiff's prima facie case. Grigsby, 821 F.d2 at 596.

6. Wal-Mart's rebuttal evidence, economic necessity in which the plaintiff was laid off after consideration of his lower productivity, constitutes sufficeint

justification evidence in light of Plaintiff's attempt to create an inferene of discrimination.

7. Plaintiff at no time presented evidence demonstrating that Defendant's rebuttal evidence was pretextual.

8. Plaintiff's allegation that he was discharged in retaliation for his complaints appears to be predicated on what is "sometimes referred to as "Titile VII's "opposition clause." Bigge v. Albertson's, Inc., 894 F.2d 1497, 1501 (11th Cir. 1990); see 42 U.S.C. 2000e-3(a).

9. To prove a prima facie case of retaliation under the opposition clause, a plaintiff must prove:

> (1) that there was a statutorily protected participation; (2) that an adverse employment action occurred; and (3) that there was a causal link between the participation and the adverse employment action.

Bigge, 894 F.2d at 1501 (quoting Simmons v. Camden County Board of Education, 757

F.2d 1187 1189 (11th Cir.), cert. denied, 474 U.S. 981 (1985) and Whatley v. Metropolitan Atlanta Rapid Transit Authority, 632 F.2d 1325, 1328 (5th Cir. 1980)).

10. "The first element is established if the plaintiff can show that he opposed an unlawful employment practive which he reasonably believed had occurred." Bigge, 894 F.2d at 1501. However, unfounded assumptions on the plaintiff's part are not sufficient. See Evers v. General Motors Corp., 770 F.2d 984, 986 (11th Cir. 1985). Plaintiff has not demonstrated that he reasonably believed an unlawful employment practice occurred, but rather, relies on vague allegtions of harassment.

11. Even if the court determined that Plaintiff reasonably believed the unlawful employment practices occurred, no evidence was presented to demonstrate that there was a causal link between the

participation and the adverse employment action. Management's explanation of the criteria for dismissal was sufficient and no showing was made by Plaintiff that Defendant's explanation was pretexual.

12. Pursuant to the above findings of fact and conslusions of law, the Court finds that the Plaintiff has failed to prove a prima facie case as to any of his claims. Further, even if the Plaintiff had proven a prima facie case on any claims, the Defendant has demonstrated sufficient rebuttal evidence for the Court to find in Defendant's favor.

It is so ORDERED.

DONE this 1st day of February, 1993.

W.B. Hand
Senior District Judge

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-6204
Non-Argument Calendar

D.C. Docket No. 92-0113-BH-C

DARRYL BLACKMON,

vs. Plaintiff-Appellant,

WAL-MART STORES, INC., d/b/a/
Sam's Wholesale Club

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Alabama

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Before TJOFLAT, Chief Judge, BLACK, Circuit Judge, and TUTTLE, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

SUPREME COURT, U.S.
FILED
DEC 28 1993
OFFICE OF THE CLERK

(2)

No. 93-851

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DARRYL BLACKMON,
Petitioner,

vs.

WAL-MART STORES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Where the decisions of the lower courts establish that the Petitioner failed as a matter of law to present either a prima facie case of employment discrimination or any evidence of pretext for such discrimination and where, in addition, the Petitioner has not sought certiorari as to those findings, has the Petitioner been prejudiced by the decisions of those courts not to give the Civil Rights Act of 1991 retroactive effect?

2. Should the Civil Rights Act of 1991 be retroactively applied to conduct occurring before the Act's effective date?

LIST OF PARTIES AND OF PARENT AND SUBSIDIARY CORPORATIONS

The parties to the proceedings below were the Petitioner, Darryl Blackmon, and the Respondent, Wal-Mart Stores, Inc. "Sam's Wholesale Club," though identified in various pleadings, briefs and other papers as a purported entity by which Wal-Mart Stores, Inc. "does business," is neither a subsidiary nor a parent corporation, but is instead simply an operating division of Wal-Mart Stores, Inc., and which is in fact correctly designated as "Sam's Club" and not "Sam's Wholesale Club."

Wal-Mart Stores, Inc. has no "parent corporation" and lists the following subsidiaries and divisions:

Arkansas Import and Distribution Co. (AIDCO)
Beaver Lake Aviation, Inc.
Big K. Edwards
Broadstreet Investment Co.
Bud's Warehouse Outlet (Div)
Claims Management, Inc.
Commercializadora Mexico Americana S.A. de C.V.
Controladora Club Aurrera S.A. de C.V.
    Club Aurrera S.A. de C.V.
    Immobiaiaria Capir S.A. de C.V.
Global Sourcing, Inc.
Hutcheson Wholesale Shoes Co., Inc.
Hyper-Mart (Div)
Kuhn's Big K, Inc.
McLane Company, Inc.
    McLane America, Inc.
    McLane Convenience Foods, Inc.
    McLane Sandys Fast 'n Fresh, Inc.
    McLane/Eastern, Inc.
    McLane/Foodservice-Lubbock, Inc.
    McLane/Foodservice-Temple, Inc.

McLane/International, Inc.
McLane/Midwest, Inc.
McLane/Pacific, Inc.
McLane/Southern, Inc.
McLane/Suneast, Inc.
McLane/Sunwest, Inc.
McLane/Western, Inc.
Merit Distribution Services, Inc.
RDM Insurance Group, Ltd.
North Arkansas Wholesale Company, Inc.
NADCO
Phillips Companies, Inc.
PRRT, Inc.
Quality Licensing Corp.
Sam's Club (Div)
Sam's PW, Inc.
SuperSaver Wholesale Club, Inc.
Temple Beverages, Inc.
The Wholesale Club, Inc.
Wal-Mart Pharmacy of Michigan, Inc.
Wal-Mart Puerto Rico, Inc.
Wal-Mart Realty Company
Westborough Beverage, Inc.
Western Merchandisers, Inc.
WMR, Inc.

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Landgraf v. USI Film Products, 968 F.2d 427 (5th Cir. 1992), *cert granted*, ___ U.S. ___, 113 S.Ct. 1250 (1993) 7

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 7,8

St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S.Ct. 2742 (1993) 8,9

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 7,8

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No. 93-851

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DARRYL BLACKMON,

Petitioner,

VS.

WAL-MART STORES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Wal-Mart Stores, Inc. respectfully urges this Court to deny the Petition for a Writ of Certiorari by which the Petitioner seeks review of the judgment of the United States Court of Appeals for the Eleventh Circuit entered August 27, 1993.

OPINION BELOW

While the opinion of the court of appeals summarily affirming the district court's judgment has not been published, a table noting the disposition of the case is reported at 3 F.3d 443.

STATUTORY PROVISIONS INVOLVED

In addition to involving the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified primarily in various

sections of 42 U.S.C.), this Petition also involves 28 U.S.C. § 2111, which provides as follows:

> **§ 2111. Harmless error**
>
> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

STATEMENT OF THE CASE

The Petitioner's statement of the case is incomplete and occasionally departs from the material facts of record as determined by the courts below. Moreover, the Petitioner has not challenged those findings of fact or conclusions of law in his Petition, as he did in the court of appeals.[1] Pursuant to Rule 14.1(a) of the Rules of the Supreme Court, the correctness of those findings of fact and conclusions of law is not at issue here because it is not a question "set forth in the petition, or fairly included therein ...." *Id.*

The Respondent offers the following clarifying statement of the case and also adopts the district court's findings of fact and conclusions of law, which, despite occasional typographical errors and the omission of one of the district court's footnotes, are substantially contained in the "Appendix" to the Petition.

---

[1] The "Statement of the Issues" presented in the Petitioner's brief in the court of appeals was as follows:

1. Whether the Civil Rights Act of 1991 is to be applied retroactively to events which occurred prior to its November 1991 effective date.

2. Whether the District Court's holding that Plaintiff failed to prove a prima facie case of discrimination and/or failed to prove pretext was clearly erroneous.

As explained by the district court:

> The Plaintiff, Darryl Blackmon, is a black male and was employed as a stocker in the "hardlines" department of the Sam's Club in Mobile until August 25, 1989. The manager of the Defendant Club is Mr. Bert Ritter, a white male, who has served as store manager in the Mobile facility since March or April, 1989. On December 12, 1989 Plaintiff filed a Charge of Discrimination against the Defendant with the Birmingham Regional Office of the Equal Employment Opportunity Commission ("EEOC"). In the Charge of Discrimination, Plaintiff alleged racial discrimination as to his August 25, 1989 termination and racial discrimination relating to his on-the-job treatment by the Defendant. The EEOC did not find reasonable cause to [substantiate] the allegations of discrimination and issued Plaintiff a Notice of Right to Sue.

(Pet. 1a-2a) (correcting typographical error in Appendix).

The district court framed the issues before it as follows:

> The Plaintiff's Complaint by statement of the parties limits his contentions to a claim that he was discharged because of his race in violation of . . . Title VII of the Civil Rights Act of 1964, as amended. The triable issues include determinations of whether the Plaintiff was discriminated against based on his race because he requested a promotion and commented on racial overtones and harassment in the workplace. Further, a final [issue] is whether Plaintiff would have been terminated regardless of any alleged discrimination due to Plaintiff's poor work performance and economic factors allegedly [precipitating] the reduction in force in which the Plaintiff was discharged.

(Pet. 2a-3a) (correcting typographical errors in Appendix).

Following a bench trial, the district court held, as the Petitioner correctly notes, "that substantial evidence was not produced from which a factfinder could reasonably conclude that the employer intended to discriminate on the basis of race." (Pet. 4). Specifically, the district court held that "there is no substantial evidence from which a fact finder could 'reasonably conclude that the employer intended to discriminate' on the basis of race in regard to the Plaintiff's termination" (quoting *Early v. Champion International Corporation*, 907 F.2d 1077, 1082 (11th Cir. 1990)). (Pet. 9a). As to the claim that the Petitioner was "discriminated against ... because he requested a promotion and commented on racial overtones and harassment" (i.e., the Petitioner's "retaliation" claims), the district court again held that the Petitioner failed to establish a prima facie case and concluded in particular: (1) that the "Plaintiff has not demonstrated that he reasonably believed an unlawful employment practice occurred, but rather, relies on vague allegations of harassment," and (2) that "no evidence was presented to demonstrate that there was a causal link between the participation [in the allegedly protected conduct] and the adverse employment action." (Pet. 12a-13a).

Equally important is the district court's alternative holding that "even if the Plaintiff had proven a prima facie case on any claims, the Defendant has demonstrated sufficient rebuttal evidence for the Court to find in Defendant's favor." (Pet. 13a). That rebuttal evidence, which clearly established that the reduction-in-force in which the plaintiff was terminated resulted from "economic necessity in which the plaintiff was laid off after consideration of his lower productivity," (Pet. 10a), was explicitly held to be *not pretextual*: "Plaintiff at no time presented evidence demonstrating that Defendant's rebuttal evidence was pretextual." (Pet. 11a). As to the claim for retaliatory discharge, the district court again found that "[m]anagement's explanation of the criteria for dismissal was sufficient and *no showing* was

made by Plaintiff that Defendant's explanation was pretextual." (emphasis added). (Pet. 13a).

Thus, not only did the district court hold that the Petitioner failed to present "substantial evidence" as to a prima facie case as to any claim, but also that the Petitioner never "presented evidence" demonstrating pretext with regard to the Respondent's nondiscriminatory reason for terminating the Petitioner.

REASONS FOR DENYING THE WRIT

The district court's findings of fact and conclusions of law, which were affirmed by the Court of Appeals and which have not been challenged in this Petition,[2] establish that no prejudice resulted to the Petitioner by the courts below giving only prospective application to the Civil Rights Act of 1991 ("the Act"). In particular, those findings and conclusions establish that the Petitioner would not have been entitled to legal damages or to present his case to a jury even under a retroactive application of the Act, because the Petitioner's claims were not supported by legally sufficient evidence as a matter of law. Any error of which the Petitioner complains is plainly "harmless" error, because the Respondent would have been entitled to a judgment as a matter of law on this record. *See* 28 U.S.C. § 2111 ("Harmless Error"). The Petition should therefore be denied.

As explained by Court of Appeals for the Fifth Circuit (which precedent is binding on the Eleventh Circuit in this instance)[3]:

> [T]his Court does not demand jury consideration of an issue which is determinable by directed verdict. The question whether evidence is sufficient for submission to a jury is procedural .... According to the test articulated by this Court in *Boeing Co. v. Shipman*, 5 Cir. 1969, 411 F.2d 365, 374-375, 'the motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a

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[2] Thus, pursuant to Rule 14.1(a) of the Rules of the Supreme Court, the correctness of those findings of fact and conclusions of law is not an issue before the Court, as that issue is not "set forth in the petition, or fairly included therein ...." *Id.*

[3] *See Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981) (en banc) (in which the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to October 1, 1981).

> jury verdict. *There must be conflict in substantial evidence to create a jury question.'*

United States v. Williams, 441 F.2d 637, 644 (5th Cir. 1971) (emphasis added). In the instant case, the unchallenged findings of fact and conclusions of law reveal either no evidence or no "substantial" evidence in support of crucial elements as to each of the Petitioner's claims. Here, as in *Williams*, even if the "District Judge should have recognized [one party's] right to a jury trial, he should also have directed a verdict in favor of the [adverse party]." *Id.*[4] In short, regardless of whether or not Petitioner is correct in asserting that the Act should be applied retroactively, "'[t]here is no constitutional right to have twelve men [or women] sit idle and functionless in a jury-box.'" *Id.* (quoting *United States v. 243.22 Acres of Land*, 129 F.2d 678, 684 (2d Cir. 1942), *cert. denied*, 317 U.S. 698 (1943)).

The important issue of the Act's retroactive application is currently before the Court,[5] but the instant case is not in a procedural posture to be benefitted by similar review whatever the outcome of those cases.

Here, the Petitioner's failure to establish a prima facie case as to *any* claim, or alternatively, to present *any* evidence that the Respondent's reason for terminating him was a "pretext" for discrimination is fatal to the Petitioner's claims under the Court's settled and recently reiterated authorities of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of*

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[4] Or, as is now provided in Rule 50, Fed. R. Civ. P., as a result of its recent amendment, the district court should have ordered a "judgment as a matter of law" rather than a "directed verdict".

[5] *See Landgraf v. USI Film Products*, 968 F.2d 427 (5th Cir. 1992), *cert. granted*, ___ U.S. ___, 113 S.Ct. 1250 (1993); *Harvis v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992), *cert. granted sub nom. Rivers v. Roadway Express, Inc.*, ___ U.S. ___, 113 S.Ct. 1250 (1993).

Community Affairs v. Burdine, 450 U.S. 248 (1981). There the Court established "an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases." *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 2746 (1993). As explained in *Burdine*:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." ... Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not his true reasons, but were a pretext for discrimination.

Burdine, 450 U.S. at 252-53 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802) (citations omitted). In the instant case, the Petitioner's proof wholly failed at each stage. Indeed, the district court concluded (as is set forth in the Respondent's "Statement of the Case") that "there is no *substantial* evidence from which a fact finder could 'reasonably conclude that the employer intended to discriminate' on the basis of race in regard to the Plaintiff's termination" (quoting *Early v. Champion International Corporation*, 907 F.2d 1077, 1082 (11th Cir. 1990) (emphasis added). (Pet. 9a).

Moreover, beginning with *McDonnell Douglas*, the Court has recognized that if a plaintiff fails to show "pretext" for discrimination in regard to an employer's "legitimate nondiscriminatory reason" for the employment decision, then the decision "must stand." *McDonnell Douglas*, 411 U.S. at 807. *See also St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 2752 n.6 (1993) (in which the Court noted that "pretext" as referred to in *McDonnell Douglas* means pretext for discrimina-

tion); *id.* at 2759 ("*McDonnell Douglas* makes it clear that if the plaintiff fails to show 'pretext,' the challenged employment action 'must stand'") (Souter, J., dissenting). The district court specifically found that the Petitioner wholly failed to present any evidence of "pretext."

In short, the district court was presented with a case in which no prima facie was established; there was a completely articulated legitimate business reason for the Petitioner's termination, and no showing of pretext was made by the Petitioner. Under this Court's settled authorities, no issue of fact was presented as a matter of law, and the district court was required to allow the Respondent's employment decision to "stand." Indeed, the district court would have committed error had it allowed the case "to go to" a hypothetical jury. Thus, the Court's ultimate decision resolving the retroactive effect, if any, of the Act will have no effect on whether the Petitioner would be entitled to compensatory or punitive damages or to a trial by jury in the instant case.[6] Accordingly, the petition is without merit and is due to be denied.

Alternatively, even if the Petitioner were deemed to have raised the issue of the correctness of the district court's findings of fact and conclusions of law for the purposes of this Petition, such a challenge would amount to no more than a request for a second review of the trial record in an effort to overturn those factual findings in order to reach the issue of the statutory construction of the Act. That is not the function of the writ of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

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[6] Of course, in the event the Petition is granted, the Respondent will respectfully submit that the courts below were correct in refusing to apply the Act to pre-Act conduct.

In the event, therefore, that the district court's findings of fact and conclusions of law do not conclusively resolve the question presented, the Petition should nevertheless be denied. Otherwise, the Court will have to sift through the trial record and reverse the judgments of two lower courts considering that evidence before the question of the retroactivity of the Civil Rights Act of 1991 can be reached.

CONCLUSION

For the foregoing reasons, the United States Court of Appeals for the Eleventh Circuit was correct in affirming the district court's judgment, and the Petitioner has failed to advance any meritorious reason for the grant of his Petition. Accordingly, the Petition is due to be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Respondent's Brief in Opposition of Wal-Mart Stores, Inc. have been served upon counsel as shown below via U.S. Mail, overnight delivery, properly addressed this 28th day of December, 1993:

Ronnie L. Williams, Esq.
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